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BRYAN G. MOORHOUSE GENERAL COUNSEL

DANIEL P. GAHAGAN EXECUTIVE SECRETARY GREGORY V. CARMEAN

ALAL EXECUTIVE DIRECTOR

PUBLIC SERVICE COMMISSION

WILLIAM DONALD SCHAEFER TOWER
6 ST. PAUL STREET
BALTIMORE, MARYLAND 21202-6806
(410) 767-8000
FAX NUMBER (410) 333-6495

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December 19, 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable William F. Caton Secretary Federal Communications Commission Room 222 1919 M Street, N.W. Washington, D.C. 20554

Re: In the Matter of Federal-State Joint Board on Universal Service CC Docket No. 96-45

Dear Mr. Caton:

Enclosed for filing are the original and four copies of the Initial Comments of the Maryland Public Service Commission. Thank you for your prompt attention to this matter.

Sincerely,

Susan Stevens Miller

Assistant General Counsel

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Enclosures

cc: International Transcription Service Suite 140 2100 M Street, N.W. Washington, D.C. 20037 Service List CC Docket No. 96-45

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

INITIAL COMMENTS OF THE MARYLAND PUBLIC SERVICE COMMISSION

Bryan G. Moorhouse General Counsel

Susan Stevens Miller Assistant General Counsel

Maryland Public Service Commission 6 St. Paul Street Baltimore, Maryland 21202 (410) 767-8039

In the Matter of

Federal-State Joint Board on Universal Service Cc Docket No. 96-45

EXECUTIVE SUMMARY

The Maryland Public Service Commission ("MDPSC") fully recognizes and supports the public policy goals of universal service embodied in the Joint Board's Recommended Decision. The MDPSC believes that continued Federal-State cooperation is essential to ensure that all markets and subscribers receive the benefits of competition. This summary outlines the MDPSC's suggestions which are designed to realize the goal of universal service within a competitive marketplace. Specifically, the MDPSC suggests the following:

- For the High Cost Fund, the MDPSC recommends that the FCC either adopt a cap that would limit the per line contribution to the federal high cost fund or establish a nationwide per line charge.
- The proxy model designed to estimate the level of high costs should be used <u>solely</u> for the purpose of determining the universal service costs for the federal program.
- Rural companies should not have the option of vountarily changing to the proxy model system before the end of the transition period because this action will result in increases to the fund's size.

- Single business lines should not be included in the concept of universally service because this inclusion goes beyond Congressional intent, will dramatically increase the size of the fund and is subject to abuse.
- The MDPSC recommends that states be represented on the universal service advisory board which will select, oversee and provide guidance to the universal service fund administrator.
- The National Exchange Carrier Association should be permitted to participate in the competitive bidding process designed to select the administrator of the fund.
- The universal service fund administrator should be required to provide the states with information necessary to ensure that the fund is being administered properly.
- States should have authority to perform or require an audit of the universal service fund.
- The 1996 Act clearly preserves State authority under \$152(b).
- Moreover, application of \$152(b) and \$610 requires a narrow reading of the FCC's authority.

• An examination of the text of the statute makes clear that the FCC lacks authority to assess the intrastate revenues of interstate carriers in order to determine the carrier's contribution to the federal universal service fund.

TABLE OF CONTENTS

		Page
	Executive Summary	i
I.	Introduction	1
II.	Federal High Cost Assistance Program	4
III.	Contributions to the Federal Universal Service Fund Should Be Based Solely on the INTERSTATE Revenues of Interstate Carriers	10
TV.	Conclusion	1.8

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

In the Matter of

FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

CC DOCKET NO. 96-45

I. INTRODUCTION

On February 8, 1996, the Telecommunications Act of 1996 ("1996 Act") was signed into law by President Clinton. Section 254 of the 1996 Act requires the Federal Communications Commission ("FCC" or "Commission"), and permits state commissions, to establish a mechanism to maintain universal telephone service. At least three kinds of support are specifically enumerated in the 1996 Act: support for high cost areas; support for schools, libraries and rural health care providers; and support for lowincome customers.

In Section 254, the 1996 Act provides a specific mandate to the FCC to institute a Joint Board to recommend procedures for implementing the Act's various principles regarding universal service. The Act directs the FCC and the Joint Board to preserve and advance the availability of quality services at just, reasonable and affordable rates; promote access to advanced telecommunications services throughout the nation; and advance the availability of such services to all consumers,

¹ The current federal universal service programs are High Cost Assistance, Dial Equipment Minute Weighting, Lifeline/Linkup and Long Term Support.

including low-income customers and customers in rural, insular and high cost areas, at rates that are reasonably comparable to those charged in urban areas. Under the 1996 Act, the Joint Board and the FCC also must consider issues such as the implementation of: equitable and non-discriminatory provider contributions to universal funding; support mechanisms that are specific and predictable; and advanced services to schools, libraries and health care providers.

Pursuant to these mandates, the FCC issued a Notice of Proposed Rulemaking ("NPRM") on March 8, 1996. The NPRM established a Joint Board and requested comment on the implementation of various provisions in Section 254 of the 1996 Act. Further, the NPRM stated the FCC's intention to define the services that will be supported by federal universal support mechanisms, define those support mechanisms, and otherwise recommend changes to current regulations to implement the universal service directives in the 1996 Act. Also, the NPRM asked which services to support, how to implement explicit support mechanisms, how to determine affordability, how to calculate the "subsidy", which cost proxy model to use, how to define service areas, and requests recommendations for low-income customer support - including toll limitation services, Lifeline and Link Up America programs.

On November 8, 1996, the Federal-State Joint Board adopted a Recommended Decision regarding universal service. 2 In the Recommended Decision, the Joint Board made numerous recommendations on universal service issues, including issues relating to universal service principles; services eligible for support; support mechanisms for rural, insular and high cost areas; support for low-income consumers; affordability; support libraries and health providers; for schools. care and administration of support mechanisms and common line cost In addition, the Joint Board recommended that the Commission specifically seek additional information on a number On November 18, 1996, the Common Carrier Bureau issued a public notice seeking comment on the Recommended Decision.

The Joint Board is proposing a universal service plan with three components. One component is the high cost program to transfer funds to eligible communications carriers serving high cost areas. A second component is aimed at providing assistance to low-income individuals. The third component would provide discounts on telecommunications services to schools, libraries and rural health care providers. The Maryland Public Service Commission ("MDPSC") respectfully submits these comments addressing only the federal high cost assistance program component of the Joint Board's universal service plan. Also, the MDPSC's

In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision (November 8, 1996) ("Recommended Decision").

comments will address the FCC's authority to fund federal universal service programs through a combination of interstate and intrastate revenues.

II. FEDERAL HIGH COST ASSISTANCE PROGRAM

The Joint Board is recommending that for non-rural carriers, the amount of high cost assistance be based on the difference between a benchmark amount and the cost of service determined by the proxy amount. For rural companies, the existing federal explicit assistance programs, High Cost Assistance, Dial Equipment Minute Weighting and Long Term Support Benefits will be frozen on historical per-line amounts. The rural companies will then be granted a three-year transition period to shift to the proxy cost models.

The MDPSC agrees with the Joint Board recommendation that all interstate carriers should contribute to the federal universal service fund. However, the Joint Board was unable to agree on the revenue base for high cost support. As will be discussed in the next section, the MDPSC contends that the FCC lacks the authority to assess the intrastate revenues of interstate carriers.

The Staff Subcommittee on Communications of the National Association of Regulatory Utility Commissioners ("NARUC"), with assistance from the Telecommunications Industries

³ Recommended Decision, para. 7.

^{4 &}lt;u>Id.</u>, para. 779.

Analysis Project, prepared a paper addressing the legal, policy and financial issues raised by the interstate/intrastate revenue issue. Under each of the options presented by this paper, Maryland is a net contributor to the High Cost Fund. The amount of Maryland's contribution range from \$22,912,000 to \$117,056,000. Assuming a \$30 benchmark under the BCM2 option, Maryland's per line contribution would be \$28.95 per line. Use of a combined revenue base consistently resulted in Maryland paying a greater amount into the federal universal service fund versus the jurisdictionally correct interstate revenue base.

Maryland is a leader in promoting local exchange competition. A review of the NARUC paper reveals that Maryland and other states that are in the forefront of local exchange competition, will be net contributors to the federal universal service fund. This result is unfair because it means that those states that have taken steps to achieve competition will be penalized for their success.

Maryland has docketed a proceeding to examine universal service issues. Given the projected amount of contribution required to fund interstate universal needs, Maryland may not be able to pursue its own intrastate universal service directives because of the lack of financial resources. Furthermore, this result may be exacerbated by the FCC's access charge decision.

⁵ See Appendix B. Appendix A is a summary of the data provided in the paper.

⁶ See page 3B of Appendix A.

Maryland does not have the excess financial resources to subsidize telecommunications providers in other states. Data from 1990 prepared by the Maryland Office of Planning shows that 15 percent of households in Maryland have incomes of less than \$14,999. For Baltimore City, that percentage increases to 33 percent. While Maryland has one of the highest penetration levels in the nation, a county analysis shows an 8.9 percent differential between the county with the highest penetration level and the county with the lowest level. Maryland has specific universal service funding needs that cannot be met if intrastate revenues are used to fund out-of-state providers of out-of-state providers basic telephone service.

The Joint Board recommends that the benchmark should be the sum of the revenues generated by local, discretionary and access services provided to residential subscribers. Currently, the average residential flat service rate, including the Subscriber Line Charge and excluding taxes, 911 and other surcharges, is approximately \$17.20.7 Discretionary and access services traditionally have been priced above cost, but competitive pressures are forcing down the rates for these services. The MDPSC recommends that the FCC adopt a cap that would limit the per line contribution to the federal high cost fund. This cap will prevent excessive subsidies from "low cost" states to companies in "high cost" states. As an alternative, the FCC should consider a nationwide per line charge. If single

⁷ Recommended Decision, fn. 1008.

business lines are to be funded, a separate benchmark should be established.

The Joint Board recommends that a proxy model be used to estimate the level of high costs. The MDPSC supports the Joint Board's recommendation that an appropriate proxy model be developed so long as this model is used for the sole purpose of determining the universal service costs for the <u>federal</u> program. The MDPSC notes that states will select the appropriate methodology for determining the cost of their intrastate high cost programs regardless of the proxy selected for the federal high cost program. States are in the best position to properly target high cost assistance. In designing the state high cost programs, states have multiple options including using actual costs or selecting or designing a proxy model to identify high cost areas.

States have primary responsibility for designating the service area for determining universal service costs. State commissions have the duty to ensure just, reasonable and affordable rates through their exclusive jurisdiction over local rates, intrastate access, local termination rates, and unbundled element pricing. The individual states are best qualified to target high cost assistance.

As noted earlier, the Joint Board recommends that rural companies will have a three-year transition period to shift to proxy cost models. The Joint Board proposes that rural

⁸ Recommended Decision, para. 6.

^{9 &}lt;u>Id</u>., at para 7.

model system before the end of the five-year period. 10 Giving rural companies the flexibility to choose between the frozen per line revenue support or the proxy model will put upward pressure on the fund. Only those companies which expect a higher subsidy will voluntarily change. The MDPSC objects to allowing rural companies to deviate from the transition plan because this deviation will result in increases to the fund's size.

The MDPSC believes that state commissions are best suited to design state-specific, high cost assistance programs to serve the needs of their state. The MDPSC has commenced a universal service proceeding to examine issues specific to Maryland. Also, states are responsible for ensuring service quality and the availability of telecommunications services. Finally, States have the power to order companies to serve unserved areas. The Joint Board recognizes that states may adopt and enforce service quality rules on a competitively neutral basis, consistent with Section 253(a). State-specific universal service programs allow states greater flexibility in ensuring the availability and quality of telecommunications services to its residents.

The MDPSC agrees with the Joint Board recommendation that the statutory criteria set out in Section 214(e) be used to

¹⁰ Id., at fn. 1181.

¹¹ See, 47 U.S.C. §214(e)(3).

¹² Recommended Decision, para. 104.

determine which carriers are designated eligible carriers. Specifically, Section 214(e) requires that, throughout its designated service area, an eligible carrier shall: (1) offer all of the services that are supported by the federal universal service mechanism; (2) offer such services using its own facilities or a combination of its own facilities and resale of another carrier's services; and (3) advertise the availability and charges for such services. 13

The MDPSC agrees with the Joint Board recommendation that support for designated services provided to residential customers should be limited to those services carried on a single connection to a subscriber's principle residence. However, the MDPSC disagrees with the Joint Board's recommendation that designated services to businesses in rural, insular and other high cost areas should be supported by universal service mechanisms. Including single line businesses in the concept of universal service goes beyond the intent of Congress and will dramatically increase the size of the fund. Furthermore, state commissions and the FCC lack the ability to police singe line customers. In order to obtain universal service benefits, a business customer could obtain single lines from multiple companies or attach a PBX to a single business line. The MDPSC

¹³ Recommended Decision, para. 6.

¹⁴ Id., at para. 89.

^{15 &}lt;u>Id</u>., at para. 91.

believes that the better alternative is to allow the competitive marketplace to operate to control costs for businesses.

The Joint Board recommends creation of a universal service advisory board to select, oversee and provide guidance to the chosen administrator. The MDPSC recommends that states be fairly represented on the board. The MDPSC supports the Joint Board's recommendation that the administrator of the fund be selected in a competitive bidding process. The National Exchange Carrier Association should be permitted to participate in the bidding process. Finally, the MDPSC recommends that the administrator provide the states with the necessary information to assure the states that the funds are being administered properly. In addition, states should have the authority to perform or require an audit of the universal service fund.

III. Contributions to the Federal Universal Service Fund Should Be Based Solely on the INTERSTATE Revenues of Interstate Carriers.

The 1996 Act establishes competition in all communications markets as a national policy goal and outlines the respective responsibilities of the state commissions and the FCC to implement the policies necessary to achieve these national goals. In addition to endorsing competition in the communications market, the 1996 Act calls for consumers in all regions of the country to have access to telecommunications and information services at rates that are reasonable compared to those in urban areas. At the State level, ensuring universal service is an important public policy goal. One method of ensuring universal service is by means of a state universal service fund. State

interest in universal service did not originate with the 1996 Act. Several states have had universal service funds in place for some time.

As noted earlier, on November 8, 1996, the Federal-State Joint Board issued a Recommended Decision addressing how universal service funds should be collected and distributed. With regard to the collection issue, the Joint Board recommended imposing a uniform charge on the net revenues of interstate telecommunications carriers. For schools, libraries, rural health care providers and low-income customers, the Joint Board recommended that funding be derived from both the interstate and intrastate revenues of interstate carriers. However, the Joint Board was unable to agree on the revenue base for high cost support. Specifically, members of the Joint Board disagreed concerning whether the revenues should be derived from a charge on the carrier's interstate revenues or on the combined (interstate and intrastate) revenues of such carriers. 17

The position of the MDPSC was aptly summarized by a dissenting Joint Board member:

The jurisdiction between the Commission and the states is distinct. The Commission possesses authority to assess interstate revenues, while State commissions have authority to utilize intrastate revenues. To recommend that the Commission utilize intrastate revenues is certainly beyond the scope of its jurisdiction.

¹⁶ Recommended Decision, para. 817.

¹⁷ Id.

Separate Statement of Commissioner Schoenfelder, member of the Joint Board. See also, Separate Statement by Commissioner McClure.

Section 2(b) of the Communications Act of 1934 (*1934 Act*), as well as Sections 254 and 601(c) of the 1996 Act, all support the conclusion that the FCC lacks the authority to base contributions to the federal universal service fund on intrastate revenues. Any conclusion to the contrary would nullify Section 2(b) of the 1934 Act, which is still in full force and effect.

The intrastate exception to FCC authority was not altered by the 1996 Act. 19 Section 2(b) of the 1934 Act was not amended by the 1996 Act and still provides an express limitation on the FCC's jurisdiction that "nothing in this Act shall be construed to give the Commission jurisdiction with respect to: charges, classifications, practices, services, facilities, or regulations for or in connection with <u>intrastate</u> communications services by wire or radio of any carrier." 47 U.S.C. Section 152(b) (Emphasis Added). By its terms, this provision removes intrastate matters from the FCC's reach, resulting in the dual regulatory system we know today.

The Recommended Decision provides no legal rationale for the conclusion that the interstate/intrastate distinction has been abrogated. The 1996 Act does not abrogate the dual

¹⁹ It should be noted that the traditional "interstate" limitation of the FCC also remains unchanged by the 1996 Act. 47 U.S.C. Section 151(b).

 $^{^{20}}$ As early as 1930, the Supreme Court recognized the importance of the interstate/intrastate distinction, stating:

The separation of the intrastate and interstate property, revenues, and expenses of a company is important not only as a theoretical allocation to two branches of business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930).

regulatory system, but affirms it. In reviewing the 1996 Act, it is clear that no abrogation was intended. The Joint Board's approach represents an attempt to rewrite the legislation and remove Section 2(b) from the Telecommunications Law. This approach is wholly inconsistent with Congressional intent and legislative history. To the contrary, the 1996 Act generally repudiates the approach taken by the Joint Board. Furthermore, the 1996 Act is quite clear in granting the FCC authority over intrastate matters where it intended to do so, and no clear expression of authority is contained in Section 254.

Nothing in the 1996 Act or the Joint Explanatory Statement of the Committee of Conferences ("Explanatory Statement") supports the Joint Board's conclusion that the FCC has authority to utilize intrastate revenues in determining a carrier's contribution to the federal universal service fund. Congress was fully aware of the existence of Section 2(b) when it passed the 1996 Act and could have expressly granted the FCC authority but chose not to do so.

Legislative history also supports the conclusion that Congress did not intend to grant the FCC the authority to utilize intrastate revenues. Originally, both HR 1555 and S. 652 contained a revision of Section 2(b) which would have altered Commission authority. See, S. 652 Rep. No. 104-230 at 78; and HR 1555 Rep. No. 104-204 at 53. However, the final version of the 1996 Act did not contain this amendment. Statutory construction principles place great weight on the fact that Section 2(b), at one point, was amended by this legislation but ultimately was

restored to its full effect. Contrary to the Joint Board's conclusion, these actions would seem to indicate that Congress considered whether the FCC should have authority to utilize intrastate revenues and decided that the Commission should not have such authority. Thus, the 1996 Act preserves Section 2(b) and the states' exclusive authority over intrastate revenues.

In Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986), the Supreme Court reached two conclusions applicable to the Joint Board's contention that the FCC has authority to use intrastate revenues. First, the Court found that the FCC could not take action to advance a broad federal policy where the effect is to disregard Section 2(b)'s express jurisdictional limitation. Louisiana, 476 U.S. at 374-375. Applying this finding to the present situation, it is clear that the Joint Board cannot rely upon the broad Congressional intent to promote universal service to support its conclusion that the FCC has authority over intrastate revenues. Second, the Louisiana Court found that Congress had established a dual regulatory system in the communications arena. The 1996 Act reinforces this dual system, it does not negate it. present situation, Congress simply has not granted the FCC authority to use intrastate revenues to fund federal universal service programs.

More important, the approach advocated by the Recommended Decision is directly prohibited by Congress. Section 601(c) of the 1996 Act clarifies that the Act "shall not be construed to modify, impair, or supersede Federal, State, or

local law unless expressly so provided in such Acts or amendments." Through enactment of Section 601(c), Congress has mandated that any change to the traditional dual regulatory scheme should be based on the express provisions of the 1996 Act. Furthermore, Congress, through this section 601(c), emphasized that modification of Federal or State law should not be implied based upon corollary provisions or by inference. By contrast and inconsistent with this explicit Congressional directive, the Joint Board's conclusion appears to be based solely on inference and implication.

Section 254 itself supports the conclusion that the FCC lacks jurisdiction to assess intrastate revenues. The structure of this section actually prohibits the FCC's use of intrastate revenues. The 1996 Act requires that funding for the federal program be derived from "every telecommunications carrier that provides <u>interstate</u> service. "22 Given that Congress specifically declined to amend Section 2(b) and included Section 601(c) in the 1996 Act, the logical conclusion is that Congress intended this language to serve as a limitation on the revenues that can be charged to support federal universal service as well as a designation of the carriers who can be required to contribute.

Including only interstate revenues for federal universal service purposes will not be burdensome. All interstate carriers currently separate their revenues for Telecommunications Relay Service ("TRS") purposes. The TRS funding mechanism, based on interstate gross revenues, has been in place since July 23, 1993. All carriers, including IXCs, LECs, CLECs, mobile carriers and resellers, have been able to identify their interstate revenues without any problems. Similarly the use of only interstate revenues for the federal universal fund should not cause any difficulties.

²² 47 U.S.C. §254(d).

Further support for this interpretation is found in the contrasting language relating to state universal programs. The 1996 Act limits the states to drawing support for universal service programs solely from carriers providing intrastate services. 23 When these requirements are read together, it is clear that Congress intended the specific reference to interstate carriers to mean that a distinction should be made for a separate federal support mechanism. Congress has made it clear that there is a distinction between the federal and state universal service programs and thus the same distinction should follow the contribution for these programs. The authority to utilize intrastate revenues as a base for contributions rests solely with the individual state commissions. 24 Section 254(f) anticipates that state universal service programs complement the federal program, not compete with it. interstate revenues should be utilized for funding the federal universal service program, allowing intrastate telecommunications revenues to be used for funding the complementary state universal service programs.

In sum, there is no indication that Congress intended to alter the current jurisdictional responsibilities between

²³ 47 U.S.C. 254(f). The Explanatory Statement also supports this conclusion. Congress specifically stated that "[s]tate authority with respect to universal service is specifically preserved under new Section 254(f). <u>Id</u>. at 132.

As noted by Commissioner McClure, courts have required that regulatory agencies maintain jurisdictional distinctions when using carrier revenues to support the costs of a particular service. Separate Statement of Commissioner Kenneth McClure, concurring in part and dissenting in part, discussing <u>ATGT v. PSC</u>, 625 F. Supp. 1204 (D. Wyo. 1985).

federal and state governments over interstate and intrastate The 1996 Act contains no explicit authorization for revenues. the FCC to impose a charge for universal service on the intrastate revenues of interstate carriers. Absent such an explicit grant of authority, the FCC cannot impose any assessment on Section 254(d) when read in conjunction intrastate revenues. with Sections 2(b) and 254(f) limits the FCC's authority to interstate revenues. The 1996 Act does not nullify Section 2(b) of the 1934 Act. If anything, the 1996 Act is an affirmation that Congress intended to retain a dual system of regulation. The Joint Board's conclusion that the FCC has the authority to utilize intrastate revenues in determining an interstate carrier's contribution to the federal universal service fund is incorrect and not supported by legal precedent.

Congress clearly intended the 1996 Act to preserve state authority over universal service matters within the State. Utilizing intrastate revenues to fund the federal universal service programs will negatively impact state programs. Applying the federal surcharge to intrastate revenues will unfairly shift most of the burden of funding interstate universal service to local telephone rates. State commissions should not be hindered in developing their own viable state programs. Therefore, intrastate revenues should not be assessed, as such revenues are designed for complementary state universal service programs, not the federal fund. 25 By applying the federal universal service

Furthermore, such recovery clearly is discriminatory insofar as it assesses intrastate contributions only from those carriers that provide both interstate

surcharge only to interstate revenues, the FCC would preserve the authority of the states to fund state universal service objectives through a separate surcharge on state telecommunications revenues.

IV. CONCLUSION

The MDPSC looks forward to continuing to work with the FCC to ensure that our mutual goal of universal service is achieved. For the foregoing reasons, the MDPSC respectfully requests that the FCC incorporate into the final rule issued in this proceeding the positions and suggestions discussed in these comments.

Respectfully submitted,

Bryan G. Moorhouse General Counsel

Suson Stevens Mi

Susan Stevens Miller Assistant General Counsel

Public Service Commission of Maryland 6 St. Paul Street Baltimore, Maryland 21202 (410) 767-8039

and intrastate services. Carriers providing intrastate but not interstate services cannot be required to contribute under the 1996 Act.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1996, a copy of the foregoing document was served by mailing, postage prepaid to the parties on the attached service list.

Susan Stevens Miller

Maryland Public Service Commission

6 St. Paul Street

Baltimore, Maryland 21202

(410) 767-8038